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No. 94-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EXXON CORPORATION, *et al.*,
Cross-Petitioners,

v.

EYAK NATIVE VILLAGE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a notice of removal filed within 30 days of the initial filing of an action in state court can conceivably be untimely under the first paragraph of 28 U.S.C. § 1446(b), as held by the Court of Appeals below.

(2) Whether a defendant's time to remove under the second paragraph of 28 U.S.C. § 1446(b) is triggered by papers lacking a substantial degree of specificity, as the decision below held in conflict with other courts of appeals.

(3) Whether, as other circuits have held in conflict with the decision below, 28 U.S.C. § 1447(c) precludes remand on the basis of a perceived defect in removal procedure not raised in a timely motion.

PARTIES IN THE COURT BELOW

This conditional cross-petition is related to the petition in *Eyak Native Village, et al. v. Exxon Corp., et al.*, No. 94-650. The parties in the Court of Appeals are as identified in that petition. The numerous plaintiffs-appellants below who are directly affected by this conditional cross-petition are those listed in Appendix E to the petition in No. 94-650.

RULE 29.1 STATEMENT

Cross-petitioner Exxon Corporation has no corporate parent, and is the corporate parent of cross-petitioner Exxon Shipping Company. Cross-petitioner Exxon Corporation has numerous subsidiaries that are not wholly owned, a list of which is given in the attached Appendix C pursuant to Supreme Court Rule 29.1.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rules 12.3 and 13.5 of this Court, this is a conditional cross-petition for a writ of certiorari. The related petition is *Eyak Native Village, et al. v. Exxon Corp., et al.*, No. 94-650, filed by certain plaintiffs alleging claims related to the EXXON VALDEZ oil spill. Both the petition in No. 94-650 and this cross-petition by Exxon Corporation and Exxon Shipping Company (collectively, "Exxon") raise questions concerning the removal jurisdiction of the United States District Court for the District of Alaska ("Federal District Court").

In the decision below, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirmed one removal order of the Federal District Court (Order No. 80) and reversed four other orders (Orders Nos. 83, 91, 92, and 108). The petition in No. 94-650 seeks review of that portion of the Ninth Circuit's judgment affirming Order No. 80 and thereby upholding the removal of certain EXXON VALDEZ claims from Alaska Superior Court; Exxon is filing concurrently its opposition to that petition. By this cross-petition, however, Exxon conditionally seeks review of the other portion of the Ninth Circuit's judgment, reversing the trial court insofar as Orders Nos. 83, 91, 92, and 108 had upheld the removal of other EXXON VALDEZ claims. For both substantive and pragmatic reasons, this Court should not review in isolation the portion of the Ninth Circuit's judgment challenged in No. 94-650.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 25 F.3d 773 and reprinted in the appendix to the petition in No. 94-650. The relevant orders of the Federal District Court are

unreported. Order No. 80 is reproduced in the appendix to the petition in No. 94-650; Order No. 83 is reprinted in the Appendix to this cross-petition at App. 1a; Order No. 91 is reprinted at App. 24a; Order No. 92 is reprinted at App. 28a; and Order No. 108 is reprinted at App. 32a.[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit entered judgment on May 27, 1994; on July 13, the Ninth Circuit denied timely cross-petitions for rehearing. Pet. App. 41a. The petition in No. 94-650 was filed and received by Exxon on October 11, 1994. If that petition is considered timely, this cross-petition is timely under Rule 12.3 of this Court, being filed within 30 days thereafter.[2]

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[1] Page citations to materials in the Appendix to this cross-petition appear as "App. 00a." Page citations to materials in the appendix to the petition in No. 94-650 appear as "Pet. App. 00a."

[2] On August 29, 1994, Exxon filed a petition for certiorari styled *Exxon Corp., et al. v. Eyak Native Village, et al.*, No. 94-385, in which Exxon sought review of the Ninth Circuit's judgment insofar as it reversed Orders Nos. 91, 92, and 108; this Court denied Exxon's petition in No. 94-385 on October 11, 1994. Under this Court's Rule 12.4, the Ninth Circuit plaintiffs-appellants now petitioning in No. 94-650 were all respondents as to Exxon's petition in No. 94-385. Instead of promptly filing a cross-petition in No. 94-385 seeking review of the Ninth Circuit's judgment insofar as it affirmed Order No. 80, the Ninth Circuit plaintiffs-appellants waited for 43 days (until October 11, 1994) to present their cross-issues to the Court under the guise of an independent petition. Unfortunately, that approach will oblige this Court to devote its attention to the same decision of the Ninth Circuit on two separate occasions. If this Court nonetheless considers the petition in No. 94-650 to be timely, it must also follow that Exxon is entitled timely to file this conditional

(continued...)

STATUTORY PROVISIONS INVOLVED

The relevant statutes, 28 U.S.C. §§ 1331, 1333, 1441, 1446, and 1447, are reproduced in Appendix B hereto.

STATEMENT OF THE CASE

Much of the background relevant to this cross-petition is already set forth in the petition and opposition in No. 94-650. On March 23, 1989, the tanker EXXON VALDEZ ran aground in Prince William Sound, Alaska, resulting in a large oil spill, which was followed almost immediately by the filing of several scores of lawsuits in both state and federal court. These lawsuits generally named as defendants (1) cross-petitioner Exxon Shipping Company, the owner of the tanker, (2) cross-petitioner Exxon Corporation, the owner of the crude oil aboard the tanker, (3) Alyeska Pipeline Service Company and its owner companies (collectively, "Alyeska") who own and operate the Trans-Alaska Pipeline System and the Valdez Marine Terminal where tankers are loaded with crude oil from Alaska's North Slope, and (4) various individuals, including the EXXON VALDEZ master, Captain Joseph Hazelwood.

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[2] (...continued)
cross-petition concerning Orders Nos. 83, 91, 92, and 108 even though Exxon's August 29, 1994 petition in No. 94-385 earlier sought review as to three of those orders (Nos. 91, 92, and 108). A decision by this Court to grant review in No. 94-650 might well cause the Court to exercise its discretion differently than it did when those issues were raised in Exxon's petition in No. 94-385. Exxon also filed a petition for rehearing in No. 94-385 on November 7, 1994.

A. Exxon's Removal Of The *Eyak* Class-Action Claims (Order No. 80).

The petition and opposition in No. 94-650 detail the circumstances of the November 1991 removal to Federal District Court of the massive class action there styled *Eyak Native Village v. Exxon.* That removal was effectuated by Exxon, with Alyeska's consent. The motion of the *Eyak* class-action plaintiffs to remand that case was denied by the Federal District Court in Order No. 80; Order No. 80 was in turn affirmed by a portion of the Ninth Circuit's judgment below and is now the focus of plaintiffs' petition for certiorari in No. 94-650. This cross-petition relates to the separate removals of approximately 150 cases alleging direct-action claims (as opposed to class claims); these direct-action cases became the subject of Orders Nos. 83, 91, 92, and 108 in Federal District Court, all now reversed by the Ninth Circuit.

B. Alyeska's February 13, 1992 Removals (Order No. 83).

On February 3, 1992, the consolidated state court plaintiffs filed a joint Preliminary Designation of Issues for Trial (the "Designation") pursuant to an order of the state court requiring all parties to file a statement of the issues that they intended to litigate at trial. Under the state court's consolidation and case management orders, the Designation was binding on all state court plaintiffs.

Originally, plaintiffs' claims against Alyeska (as opposed to Exxon) had focused on Alyeska's allegedly derelict post-spill *clean-up activities.* In the Designation (quoted in pertinent part at App. 5a-6a), plaintiffs asserted for the first time that Alyeska (as opposed to Exxon) was responsible for

causing the oil spill and for that reason was liable to plaintiffs for compensatory and punitive damages. This claim was based on allegations that Alyeska, as operator of the Valdez Marine Terminal, had negligently failed to require that tankers calling there have double hulls; that Alyeska had similarly failed to require tug escorts and special navigation equipment for tankers transiting Prince William Sound; and finally, that Alyeska had successfully procured from the Federal District Court, in the case of *Chevron, U.S.A., Inc. v. Hammond*, 1978 A.M.C. 1697 (D. Alaska 1978), an injunction against the enforcement and implementation of Alaska statutes and regulations that would have required double hulls, tug escorts, and special navigation equipment.

Under the second paragraph of 28 U.S.C. § 1446(b) (Supp. V 1993, App. 37a), in a case not initially removable,

> a notice of removal may be filed within thirty days after the receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

On February 13, 1992, well within 30 days after plaintiffs' filing of the Designation, Alyeska removed approximately 150 direct-action cases to Federal District Court, on the theory that plaintiffs' claims amounted to a collateral attack on the judgment in *Chevron v. Hammond*, and thus raised a federal question under 28 U.S.C. § 1331. Exxon consented to the notices of removal. Plaintiffs in those cases moved to remand, in part on the ground that the notices of removal were untimely under the second paragraph of section 1446(b).

On July 31, 1992, the Federal District Court entered Order No. 83, denying the motion to remand and thereby upholding federal jurisdiction over plaintiffs' cases. *See* Order No. 83, App. 1a. The Hon. H. Russell Holland, who was uniquely well-positioned to review and determine the significance of plaintiffs' filings in Alaska Superior Court, determined that the Designation raised a federal question that would support removal. App. 15a-22a. He also considered at length the question of timeliness under section 1446(b).

On that question, Judge Holland noted that, prior to the Designation, plaintiffs had raised certain allegations about the EXXON VALDEZ's single-hull design and allegedly "[in]adequate preventative measures." App. 10a-12a. However, all such allegations had been directed solely at Exxon, the vessel owner, or were "too generalized . . . to have alerted Alyeska that *Chevron v. Hammond* was implicated." App. 12a. It was only when specific allegations about double hulls, tug escorts, special navigation equipment, and the prior litigation were first directed at Alyeska on February 3, 1992 that the then-pending cases became removable, and Alyeska timely sought their removal within 30 days. App. 11a-12a.

C. Removal Of The Three Newly-Filed Direct-Action Cases (Orders Nos. 91, 92, and 108).

Following the February 13, 1992 removals by Alyeska, three additional direct-action cases were filed in state court. Under the state court's consolidation and case management orders, the Designation (like all other orders in the state court proceedings) became binding on plaintiffs in newly-filed actions, absent an appropriate motion to be excluded from the effect thereof. Plaintiffs in the three newly-filed actions did

not take any action to disavow the Designation, and it became binding on them. App. 25a-27a, 29a-30a, 33a-34a.

Within 30 days of the date each of the three newly-filed cases was filed in state court, Exxon and Alyeska jointly filed a notice of removal.[3] The affected plaintiffs filed three separate motions to remand. None of those motions asserted that the removals were untimely; rather, each motion urged that the Designation did not raise any federal question. In three separate orders (Nos. 91, 92, and 108), the Federal District Court denied the remand motions in the three newly-filed cases. Judge Holland ruled that, in Order No. 83, he had already determined that the Designation raised a federal question that would support removal; since the Designation was binding on plaintiffs in the newly-filed actions, federal jurisdiction existed over the new plaintiffs' claims as well. App. 25a, 29a, 33a.

D. The Decision Of The Ninth Circuit.

The Ninth Circuit allowed an interlocutory appeal of all five removal orders. Most of the May 27, 1994 decision below is devoted to affirming Order No. 80, now the subject of the petition in No. 94-650. In Part III of its opinion, however, the Ninth Circuit turned to Orders Nos. 83, 91, 92, and 108.

Order No. 83. Limiting its discussion to Alyeska's February 13, 1992 removals of pending cases (Order No. 83),

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[3] *Daniel R. Adams, et al. v. Exxon Corp., et al.*, was filed March 18, 1992 and removed April 16; *David M. Adams, et al. v. Exxon Corp., et al.*, was filed June 3, 1992 and removed June 26; and *Talmadee Adams, et al. v. Exxon Corp., et al.*, was filed August 11, 1992 and removed September 8.

the Ninth Circuit found those removals untimely. The court brushed aside the trial court's careful determination that plaintiffs had never raised a federal question as to Alyeska prior to February 3, 1992. According to the Ninth Circuit, plaintiffs had made a filing on November 8, 1991 which "mentioned" hull design and allegedly "[in]adequate preventative measures," and that filing "did not indicate in any way that paragraphs (f) and (i) did not apply to Alyeska." Pet. App. 20a.[4] Hence, the Ninth Circuit implicitly held, Alyeska should have sought removal not later than December 8, 1991, requiring reversal of Order No. 83.

Orders Nos. 91, 92, And 108. After finding untimely the February 1992 removals of the cases involved in Order No. 83, the Ninth Circuit proceeded inexplicably and without discussion to find untimely as well the removals of the three newly-filed cases involved in Orders Nos. 91, 92, and 108. This point was never argued by the plaintiffs in the three newly-filed cases. More important, those three notices of removal could not possibly have been untimely because they (1) were all filed within the 30 days after the original complaint allowed under the first paragraph of 28 U.S.C. § 1446(b) and (2) were not even on file to be removed at the point the Ninth Circuit thought the other direct-action cases should have been removed. The Ninth Circuit neither took corrective action nor provided an explanation when Exxon's petition for rehearing called this indisputable error to the court's attention.

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[4] The Ninth Circuit also referred, illogically, to two papers previously filed or joined by Alyeska (as opposed to plaintiffs). The court did not explain how plaintiffs might be thought to have raised a federal issue in papers filed by Alyeska.

E. Additional Developments Relevant To The Cross-Petition.

Upon reversing Orders Nos. 83, 91, 92, and 108, the Ninth Circuit ordered that the affected cases should be "remanded to the district court for further proceedings consistent with this opinion." Pet. App. 22a. The mandate of the Ninth Circuit issued on November 3, 1994.

Exxon has now moved the Federal District Court to retain jurisdiction over these cases due to two developments subsequent to the trial court's consideration of the 1992 motions to remand. First, Alyeska and several other defendants have now been eliminated from the federal court litigation by way of settlements and voluntary dismissals. Accordingly, although not true earlier, there is now complete diversity as between the plaintiffs and the defendants affected by Orders Nos. 83, 91, 92, and 108. This development provides a new basis to retroactively validate the jurisdiction of the Federal District Court. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 n.18 (1951). Second, plaintiffs and Exxon have now gone to trial in Federal District Court. (Post-verdict motions are now pending.) By voluntarily participating in that trial, conducted within the Federal District Court's maritime jurisdiction under 28 U.S.C. § 1333, plaintiffs have waived any right to remand to state court.[5]

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[5] These developments are discussed more fully in the petition and opposition in No. 94-650.

REASONS FOR GRANTING THE WRIT

Petitioners in No. 94-650 advocate review of two questions supposedly raised under 28 U.S.C. § 1441 by the portion of the Ninth Circuit's judgment affirming Order No. 80. Their thesis is that the lower courts need this Court's guidance as to the application of removal principles in complex litigation. If certiorari is granted in No. 94-650 on that thesis, substantive and pragmatic considerations make it equally important for this Court also to grant this cross-petition and to address all of the removal issues raised by the Ninth Circuit's decision below, particularly the application in complex litigation of 28 U.S.C. § 1446(b).

It appears that this Court has never addressed section 1446(b), in which Congress expressly provided for removal on the basis of either (1) "the initial pleading" or (2) a subsequent "amended pleading, motion, order or other paper from which it may first be ascertained that the case is . . . removable." The Ninth Circuit's reversal of Orders Nos. 83, 91, 92, and 108 vividly demonstrates that difficulties are raised in applying section 1446(b) in the context of complex litigation, with multiple cases, multiple plaintiffs, and multiple defendants. More generally, "[t]here has been widespread disagreement among federal district courts as to what documents will trigger 1446(b)" and "appellate court rulings have [necessarily] been infrequent" in this area due to the unreviewability of orders to remand. *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 51 (3d Cir. 1993). Additionally, for pragmatic reasons, the EXXON VALDEZ claims involved in this cross-petition should be treated in tandem with the claims involved in the petition in No. 94-650.

I. THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION IN COMPLEX CASES OF 28 U.S.C. § 1446(b), A PROVISION WHICH THIS COURT APPARENTLY HAS NEVER ADDRESSED AND ON WHICH LOWER COURTS NEED GUIDANCE.

A. The Ninth Circuit Impermissibly Proceeded In Complete Disregard Of The First Paragraph Of 28 U.S.C. § 1446(b) In Finding Untimely Three Notices Of Removal Filed Within 30 Days Of The Original Complaints.

Federal courts have a duty to assume removal jurisdiction when such jurisdiction is properly invoked. *See, e.g., Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 342-45 (1976). Here, the Ninth Circuit acted in clear dereliction of that principle by baselessly condemning as untimely the notices of removal in the three newly-filed cases (Orders Nos. 91, 92, and 108) and further declining to correct its obvious error in response to Exxon's petition for partial rehearing. This Court should exercise its supervisory jurisdiction to assure that, in future removal disputes concerning multiple cases, the lower courts are properly cognizant of their duty to retain properly removed cases.

In each of the three newly-filed cases, Exxon and Alyeska jointly noticed removal within 30 days of the original filing, as provided for in the *first paragraph* of section 1446(b). At no time did plaintiffs contend that defendants' notices of removal in the three newly-filed cases were untimely, and the Ninth Circuit articulated no basis for holding removal of those three cases untimely. It cannot possibly be correct that defendants were somehow obliged to

remove the three newly-filed cases before plaintiffs filed them. The Ninth Circuit's disposition of the three newly-filed cases in complete disregard of the facts and law applicable to those cases under the first paragraph of 28 U.S.C. § 1446(b) can only have stemmed from an impermissible departure "from the accepted and usual course of judicial proceedings." Supreme Court Rule 10.1(a). The matter needs this Court's review for the same reasons as did the similar unlawful order of remand in *Thermtron Products*.[6]

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[6] In their opposition to Exxon's petition in No. 94-385 (*see* p. 2 n.2 *supra*), plaintiffs argued that Exxon conceded in Ninth Circuit briefing that a reversal of Order No. 83 as untimely also would require reversal of Orders Nos. 91, 92, and 108. This assertion is unfounded. In the Ninth Circuit, plaintiffs stated:

> Judge Holland upheld [Alyeska's February 13, 1992] removals on the *theory* that plaintiffs' state law claims "are an indirect attempt to enforce the requirements of the Alaska Tanker Law" and therefore "are a collateral attack on *Chevron v. Hammond*." Order No. 83 also rejected plaintiffs' argument that Alyeska's removal was untimely. Orders No. 91, 92 and 108 [in which there were no issues of untimeliness] adopt and rely upon the *theory* of Order No. 83.

Brief for Plaintiffs-Appellants, 9th Cir. No. 93-35274, at 14 (citation & footnotes omitted) (emphasis added). Exxon simply agreed that, insofar as the removability issue in all cases was governed by the *Chevron v. Hammond* "theory of Order No. 83" (*id.*), "the outcome as to Order 83 w[ould] govern the outcome as to Orders 91, 92, and 108." Brief for Defendants-Appellees, 9th Cir. No. 93-35274, at 2. Since no issue as to the timeliness of the removals in Orders Nos. 91, 92, and 108 had ever been raised and the timeliness ruling in Order No. 83 was not part of the *Chevron v. Hammond* theory to which the plaintiffs-appellants referred, Exxon's statement below cannot reasonably be read as conceding an issue that Exxon had no reason to believe was present. Even in their opposition to Exxon's petition in No. 94-385, plaintiffs were unable to articulate any theory under which removal of the three newly-filed cases was untimely.

B. In Conflict With Three Other Circuits, The Ninth Circuit Held That The Time To Remove Under The Second Paragraph Of 28 U.S.C. § 1446(b) Is Triggered By Papers Lacking A Substantial Degree Of Specificity.

In the second paragraph of section 1446(b), Congress specifically provided for the subsequent removal of a case not initially removable, provided that the defendant seeks removal within 30 days "after the receipt by the defendant . . . of [a] paper from which it may first be ascertained that the case is one which is or has become removable." In so providing for delayed removal of litigation already advanced in state court, Congress necessarily concluded that the benefits of making removal jurisdiction available outweigh the costs of relocating the litigation. If this congressional policy choice is to be respected, defendants are entitled to clear notice that the case has newly become removable before the 30-day removal period starts to run. Requiring clarity in the triggering paper simultaneously protects the defendant against inadvertent loss of removal rights and spares federal courts the burdens that will follow if defendants must (or can) seek removal on mere inference. These considerations need special attention when, as here, there are multiple defendants in a complex case.

Three other courts of appeals have recognized that in order for a plaintiff's document to trigger section 1446(b)'s 30-day removal period, the grounds for removal must be clearly expressed on the document's face. The Tenth Circuit has held that, if the 30-day period specified in the second paragraph of section 1446(b) "is going to run, the notice [that the case is removable] ought to be *unequivocal*. It should not

be one which may have a double design." *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979) (emphasis added). Similarly, addressing the first paragraph of section 1446(b), the Third Circuit established a rule that the document triggering the 30-day removal period must "inform the reader, to a substantial degree of specificity, whether all the elements of federal jurisdiction are present." *Foster*, 986 F.2d at 53 (citation omitted). Fifth Circuit law is in accord with the above decisions, holding that the 30-day period specified in the first paragraph of section 1446(b) begins to run only when a document "affirmatively reveals on its face" the ground for removal. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1402 (1993).[7]

The plain language of section 1446(b) provides that the 30-day removal period is measured from the date a plaintiff files some document sufficient to permit a defendant to "ascertain" that the case is removable. Accordingly, both the Third and Fifth Circuits have concluded that it is inappropriate to go through the exercise of carefully parsing plaintiffs' phrases in light of knowledge defendants may have possessed from sources outside of plaintiffs' filings. In short, "the relevant test is not what the defendants purportedly knew, but what these documents said." *Foster*, 986 F.2d at 54; *see Chapman*, 969 F.2d at 163. Such a rule "promotes

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[7] These decisions, unlike the decision of the Ninth Circuit, comport with decisions in which this Court has held that in order to find that a case presents a federal question, a "genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto." *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936); *see, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988); *Skelly Oil Co. v. Phillips*, 339 U.S. 667, 672 (1950).

certainty and judicial efficiency" and prevents courts from "expend[ing] needlessly their resources trying to determine what the defendant knew . . . ." *Chapman*, 969 F.2d at 163; *see Foster*, 986 F.2d at 53.

The Ninth Circuit's ruling below conflicts with the decisions of the Third, Fifth, and Tenth Circuits, with the attendant costs to defendants and courts addressing removal issues. According to the Ninth Circuit, Alyeska's right to remove was triggered by plaintiffs' November 8, 1991 filing (quoted at Pet. App. 20a), a laundry list of items that intermixed assertions involving Exxon and Alyeska without anywhere alleging that Alyeska had caused the oil spill by securing the injunction in *Chevron v. Hammond*. By any fair estimation, the trial court held, plaintiffs' November 8, 1991 filing lacked the kind of specificity which would alert Alyeska to the federal issues. App. 10a-12a.[8]

According to the Ninth Circuit, however, it sufficed merely that plaintiffs' November 8, 1991 filing "mentioned" the EXXON VALDEZ's single-hull design and "preventative

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[8] Paragraph (i) of the November 8, 1991 filing identified as an issue whether "defendants took adequate preventative measures" (Pet. App. 20a), an assertion having no express or necessary relationship to the matters litigated in *Chevron v. Hammond*. The Federal District Court expressly found paragraph (i) to be "too generalized . . . to have alerted Alyeska that *Chevron v. Hammond* was implicated." App. 12a. In marked contrast, the February 3, 1992 Designation (Pet. App. 5a-6a) stated that the specific "preventive measures" of double hulls, tug escorts, and special navigation equipment "were urged upon the Alyeska defendants by Alaska native corporations during construction of the pipeline, and several were required by legislation enacted before the terminal began operating. The Alyeska defendants ignored the native corporations and succeeded in having a court overturn the legislation [in *Chevron v. Hammond*]." App. 6a.

measures" and "did not indicate in any way that paragraphs (f) and (i) did not apply to Alyeska [as well as to Exxon]." Pet. App. 20a. The burden imposed by the Ninth Circuit on defendants to read plaintiffs' minds at peril of losing removal rights is entirely at odds with the approach of the Third, Fifth, and Tenth Circuits. Defendants in the Ninth Circuit now must seek to remove on mere inference or risk loss of their removal rights. Yet, as shown by the Federal District Court's evaluation of the pleadings here, it is entirely predictable that the court would have rejected an attempt by Alyeska to remove on the basis of the "generalized" November 8, 1991 filing. App. 12a. Defendants should not be placed in such an untenable position in order to protect their statutory rights of removal, nor should the courts be burdened with the self-protective notices of removal that will result from the Ninth Circuit's approach. *See DeBry*, 601 F.2d at 488-89; *Foster*, 986 F.2d at 53.[9]

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[9] The Ninth Circuit also stated that two filings by Alyeska -- *i.e.*, a defendant -- before November 8, 1991 manifested an awareness that these issues were in the case. Pet. App. 21a-22a. But this attempt to buttress the decision simply raises additional questions, and conflicts directly with the holdings in *Foster* and *Chapman* that what defendants know outside of plaintiffs' filings is simply irrelevant to section 1446(b). In addition, there can be no doubt at all that any attempt by Alyeska to remove based solely on inferences and statements in its *own* papers would have been unsuccessful.

II. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT DECISIONS HOLDING THAT 28 U.S.C. § 1447(c) PRECLUDES REMAND ON THE BASIS OF A DEFECT IN REMOVAL PROCEDURE WHICH WAS NOT RAISED IN A TIMELY MOTION TO REMAND.

Even if some argument could be constructed to support the proposition that the removals at issue in Orders Nos. 91, 92, and 108 were untimely, the question remains, did the Ninth Circuit act outside its authority under 28 U.S.C. § 1447(c) in ordering remand in the absence of a timeliness objection? The question is simple, and purely legal. The Ninth Circuit's answer was wrong, and conflicts with other circuit decisions on similar facts.

Section 1447(c) provides that "[a] motion to remand a case on the basis of any defect in removal procedure *must* be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c) (emphasis added).[10] It has been uniformly held that the failure to file a timely notice of removal is a procedural, *not* a jurisdictional, defect. *See F.D.I.C. v. Loyd*, 955 F.2d 316, 320-21 (5th Cir. 1992); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 64-66 (3d Cir. 1989); *Wilson v. General Motors Corp.*, 888 F.2d

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[10] The purpose of section 1447(c) is to prevent forum shopping by parties who might otherwise hold a procedural defect in reserve, but more importantly, to avoid the many burdens placed on state and federal courts, and parties, of shuffling cases back and forth between two courts. *See* H.R. Rep. No. 889, 100th Cong., 2d Sess. 1, 72, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 6033; *F.D.I.C. v. Loyd*, 955 F.2d 316, 322-23 (5th Cir. 1992); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1212-13 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991).

779, 781 n.1 (11th Cir. 1989); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).[11]

It follows that the defect in removal on which the court below relied in reversing Orders Nos. 91, 92, and 108 -- the so-called "untimeliness" of the removals -- was waived unless raised in a timely motion to remand.[12] *See Hamilton v. Aetna Life & Cas. Co.*, 5 F.3d 642, 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1100 (1994); *In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (5th Cir. 1992); *Air-Shields*, 891 F.2d at 65; *Wilson*, 888 F.2d at 781 n.1. It is undisputed, however, that plaintiffs below did *not* challenge, at any time in any motion to remand, the timeliness of the removals at issue in Orders Nos. 91, 92, and 108. Neither their motions to remand filed in Federal District Court, nor their briefs in the Ninth Circuit, raised this issue.

The question is thus whether a court of appeals may reverse the district court and order remand of a case on the basis of a defect in removal procedure waived by plaintiffs by their failure to assert that defect in a timely motion to

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[11] *See also* H.R. Rep. No. 889, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 6033 (defect in removal procedure includes "any ground other than lack of subject matter jurisdiction"); Siegel, *Commentary on the Revision of Section 1447*, 28 U.S.C.A. § 1447 (West 1994) (an example of a procedural defect in removal "would be where the case was removed too late under subdivision (b) of § 1446").

[12] The settled rule, set forth by this Court, is that a mere "irregularity" in a removal may be waived where the case might originally have been brought in the district court. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 19 (1951); *Mackay v. Uinta Dev. Co.*, 229 U.S. 173, 176-77 (1913). Whether brought in state or federal court, these cases are maritime and governed by maritime law; thus, subject matter jurisdiction exists under 28 U.S.C. § 1333.

remand in the district court. The decision below necessarily depends on the existence of such a power, although the court below did not explain the basis for its action. Whatever the court may have had in mind, its decision squarely conflicts with the decisions of several other circuits. *See Loyd*, 955 F.2d at 322 (Fifth Circuit: section 1447(c) "preclud[es] all remands for procedural defects after the expiration of the thirty-day remand period specified by [that section]"); *Hamilton*, 5 F.3d at 644 (Second Circuit: "Given the passage of more than 30 days without a challenge, the court lacked authority under § 1447(c) to remand the action on th[e] ground" that the removal "was procedurally improper"); *Air-Shields*, 891 F.2d at 66 (Third Circuit: a federal court exceeds its "statutorily defined power" by remanding a case for procedural defects in removal "after the thirty day limit imposed by the revised Section 1447(c) ha[s] expired").[13] The decision below should not stand.

III. PRAGMATIC CONSIDERATIONS DEMAND THAT THE DIRECT-ACTION CLAIMS NOT BE RETURNED TO THE DISTRICT COURT INDEPENDENT OF THE *EYAK* CLASS-ACTION CLAIMS.

The Federal District Court upheld removal of both the *Eyak* class-action claims (Order No. 80) and the direct-action claims (Orders Nos. 83, 91, 92, and 108). After simultaneously certifying all five orders for interlocutory review, Judge Holland proceeded to address and resolve all of these

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[13] Even the Ninth Circuit has refused to extend to its own district courts the authority to remand cases after the 30 day limit set forth in 28 U.S.C. § 1447(c). *See Maniar v. F.D.I.C.*, 979 F.2d 782, 786 (9th Cir. 1992).

EXXON VALDEZ claims together, by way of numerous summary judgment decisions and a three-phase trial of several months duration. This Court likewise should treat in tandem the class-action claims involved in No. 94-650 and the direct-action claims involved in this cross-petition.

Only mischief and confusion can result if this Court grants review as to the *Eyak* class-action claims in No. 94-650 but denies this cross-petition, thereby fragmenting the massive *EXXON VALDEZ* litigation along the arbitrary dividing line of whether similar claims relating to a single oil spill were brought on a direct-action basis or a class-action basis. As noted, the EXXON VALDEZ claims were handled on a consolidated basis by the Federal District Court (and before that by the Alaska Superior Court). Whether the ultimate home of the present direct-action claims and class-action claims (No. 94-650) is in the federal courts or the state courts, neither court system should be obliged to further address matters of substance without knowing whether it will be required to address only the direct-action claims or the class-action claims as well. Lacking such knowledge, the responsible court system would be unable to structure the most efficient proceedings to address the common issues arising in the direct-action claims and the class-action claims.

Further, unless this Court grants this cross-petition and reverses the Ninth Circuit's disapproval of the direct-action removals (Orders Nos. 83, 91, 92, and 108), Exxon will urge the Federal District Court to retain jurisdiction over the direct-action cases on the new basis of the recent developments summarized in the Statement of the Case. Similarly, should this Court grant the petition in No. 94-650 and reverse the Ninth Circuit's approval of the *Eyak* class-action removal

(Order No. 80), Exxon also will urge retention of that case in federal court due to the same recent developments. These additional, common removal issues should be resolved together and with any guidance this Court chooses to provide. Thus, should review be granted in No. 94-650, this Court should likewise grant this cross-petition or, at a minimum, order this cross-petition held for disposition in light of the decision in No. 94-650.

CONCLUSION

For the foregoing reasons, Exxon's cross-petition for a writ of certiorari should be granted if the Court grants review in No. 94-650.

Respectfully submitted,

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Dated: November 10, 1994

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 83

MOTIONS TO REMAND

Approximately 150 cases[1] arising from the grounding of the *Exxon Valdez* were removed from state court by the Alyeska defendants[2] ("Alyeska"). The State Court Plaintiffs filed a motion to remand Case Nos. A92-077 through A92-226 (except Case Nos. A92-174, A92-175, and A92-21-

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[1]Case Nos. A92-077 through A92-226, and A92-278.

[2]Alyeska Pipeline Service Company (D-3); Amerada Hess Pipeline Corporation (D-11); ARCO Transportation Alaska, Inc. (D-12); Mobil Alaska Pipeline Company (D-14); BP Pipelines (Alaska), Inc. (D-19); Phillips Alaska Pipeline Corporation (D-20); Unocal Pipeline Company (D-21); and George M. Nelson (D-9).

5),[3] and Case No. A92-278. The State of Alaska filed a separate motion to remand Case No. A92-175. Alyeska filed a joint opposition to both motions. The State Court Plaintiffs and the State separately replied. The court heard oral argument on both motions.

The removals were based on two statements made in Plaintiffs' Preliminary Designation of Issues for April 1993 Trial, filed on February 3, 1992, in state court. The first statement, as perceived by Alyeska, was that Alyeska caused the grounding of the *Exxon Valdez* and the resulting oil spill by failing to require vessels to have double bottoms, by failing to provide tug escorts, by failing to provide a special vessel monitoring and communication system, and by having this court, in *Chevron v. Hammond,* Case No. A77-195 Civil, invalidate Alaska statutes and regulations which required these same measures. The second statement was plaintiffs' claim for natural resource damages.

Chevron v. Hammond

Chevron v. Hammond, Case No. A77-195 Civil, was filed in this court in 1977 and assigned to Judge Fitzgerald.[4] Plaintiffs were a number of oil companies, including Exxon Corporation. None of the Alyeska defendants were plaintiffs in *Chevron v. Hammond.* Defendants in *Chevron v. Ham-*

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[3]Case No. A92-174 was filed by Thomas Lakosh and has a pending motion to remand. Case No. A92-215 is a class action complaint prepared by attorney Melvin Belli; no motion to remand is pending.

[4]Complaint, Exhibit 7 to State Court Plaintiffs' motion (Clerk's Docket No. 2363).

mond were various Alaska state officials including the attorney general.

Chevron v. Hammond was an action brought to have declared unconstitutional and to enjoin enforcement of certain Alaska laws and regulations[5] (hereinafter referred to as the "Alaska Tanker Law") (1) regulating the design, equipment, navigation, operation, certification, inspection, financial responsibility, oil spill liability, and clean-up capability and responsibility of oil tankers entering Alaska waters, (b) establishing a Coastal Protection Fund financed by "risk charges" imposed on tankers, and (c) imposing criminal and civil penalties for noncompliance.

The Alaska Tanker Law required all tank vessels engaged in the marine transportation of crude oil to have a LORAN-C navigational and communication system, and electronically controlled collision avoidance system, and a dual radar system. It also required that all tank vessels be escorted by tugs meeting specified power requirements in prescribed coastal areas. In addition, it imposed a certificate and assessment system which required terminals and vessels to obtain certificates of risk avoidance upon payment of "risk charges". The "risk charge" was to be set by the Alaska Department of Environmental Conservation ("ADEC") based on such factors as whether the vessel had a double hull.

While *Chevron v. Hammond* was pending, the United States Supreme Court issued *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), a decision which involved the State of

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[5]Chapter 266 of the 1976 Laws of Alaska and the implementing regulations. Exhibit 1 to Alyeska's opposition (Clerk's Docket No. - 2505).

Washington's tanker law. The Court held that insofar as the Washington tanker law required double hulls, dual radar, and a collision avoidance system, it was unconstitutional because it was preempted by Title II of the Ports and Waterways Safety Act ("PWSA").[6] As a consequence, the *Chevron v. Hammond* parties agreed to a Partial Final Judgment and Permanent Injunction[7] which enjoined defendants from taking any action to implement or enforce the Alaska Tanker Law and implementing regulations that required tank vessels to have dual radar systems, collision avoidance radar, and LORAN-C navigational equipment; and ADEC regulations requiring tug escorts for vessels in Prince William Sound.

The parties in *Chevron v. Hammond* could not agree as to the effect of *Ray* on that portion of the Alaska Tanker Law concerning "risk charges". (Risk charges were determined on whether a tanker had a double bottom or a double hull, among other things.) Judge Fitzgerald tried the issue and ruled that the risk charge system was also preempted by Title II of the PWSA. *Chevron U.S.A., Inc. v. Hammond,* 1978 A.M.C. 1697 (D. Alaska 1978).

Judge Fitzgerald entered a Partial Final Judgment and Order[8] enjoining defendants from taking any action to

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[6]Previously codified at 46 U.S.C. § 391a. The PWSA has been comprehensively amended since the decision in *Ray*. Section 391a was repealed and replaced by various new sections. The current sections that concern oil tankers are located in 46 U.S.C. §§ 3701-3718. The amendments do not undermine the judgment in *Chevron v. Hammond.*

[7]Exhibit 3 to Alyeska's opposition (Clerk's Docket No. 2505).

[8]Exhibit 5 to Alyeska's opposition (Clerk's Docket No. 2505).

implement or enforce the provisions of the Alaska Tanker Law which assessed risk charges.

Preliminary Designation of Issues

In the removed cases which plaintiffs commenced as a consequence of the grounding of the *Exxon Valdez,* the state court set a date of April 19, 1993, for trial of the liability and punitive damages issues. The state court required all parties asserting claims to file a statement of issues for that trial, including a summary of factual and legal contentions. On February 3, 1992, plaintiffs filed a Preliminary Designation of Issues for April 1993 Trial ("Preliminary Designation") which addressed issues of liability, including liability for punitive damages.[9]

The claims asserted in the Preliminary Designation which involved *Chevron v. Hammond* and which, in part, prompted Alyeska to remove the remaining state cases are:

> B. The Conduct of the Alyeska Defendants Concerning Tanker Operations in Prince William Sound Was Undertaken With Reckless Indifference to the Interests, Rights and Safety of Others and Was Sufficiently Outrageous to be Deemed Equivalent to Actual Malice.
>
> 1. ....
>
> 2. The Alyeska Defendants Acted With Reckless Indifference to the Interests of Others

[9]Exhibit 4 to State Court Plaintiffs' motion (Clerk's Docket No. - 2363).

When They Failed to Take Steps to Prevent Oil Spills in Prince William Sound From Tankers Loaded at the Alyeska Terminal.

a. The Alyeska defendants were unwilling to incur the cost of taking the following kinds of preventive measures:

(1) requiring all TAPS oil to be carried in double-bottomed tankers;

(2) providing tug escorts for all loaded tankers until they reach open water;

(3) providing a vessel monitoring and communications system that could monitor the position of all TAPS tankers between Hinchinbrook entrance and the Valdez terminal;

(4) ....

(5) ....

(6) ....

b. ....

c. Most of these preventive measure were urged upon the Alyeska defendants by Alaska native corporations during construction of the pipeline, and several were required by legislation enacted before the terminal began operating. The Alyeska defendants ignored the native corporations and succeeded in having a court overturn the legislation.

Preliminary Designation at 19-22.[10]

Alyeska relied on these statements in the Preliminary Designation as supporting removal because, Alyeska argued, the claims (1) are exclusively governed by federal law, (2) are barred by federal *res judicata,* and (3) constitute an improper collateral attack on the judgment in *Chevron v. Hammond.*

The Preliminary Designation also made numerous references to natural resources damages under Section C, which reads:

> C. As a Natural and Foreseeable Consequence of the Defendants' Actions and Omissions, the EXXON VALDEZ Oil Spill Caused Grave and Long-Standing Damage to the Environment of Prince William Sound and Beyond and Thereby Caused Substantial Damage to Plaintiffs and Members of the Plaintiff Classes, Who Depend Upon that Environment for their Livelihood and Life-style.

Preliminary Designation at 33.[11]

Alyeska relied on those statements to support removal because, Alyeska argued, claims for natural resources damages are barred by the express terms of the Agreement

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[10]Exhibit 4 to State Court Plaintiffs' motion at 28-31 (Clerk's Docket No. 2363).

[11]Exhibit 4 to State Court Plaintiffs' motion at 42 (Clerk's Docket No. 2363).

and Consent Decree entered in *United States v. Exxon Corp.*, Case No. A91-082 Civil, and *State of Alaska v. Exxon Corp.*, Case No. A91-083 Civil.

State's Motion to Remand

The State's motion to remand Case No. A92-175 is based on essentially the same legal arguments that the State Court Plaintiffs made in their motion. However, the State did raise two arguments which apply only to the State. We address these first and separately.

The State first argued that it never adopted those factual contentions which are at issue here. The state court record, however, reflects the following. The State filed a Supplement to Plaintiffs' Preliminary Designation of Issues for April 1993 Trial ("Supplement")[12] on February 3, 1992, the same date the plaintiffs filed their Preliminary Designation. The Supplement stated:

> Rather than produce a lengthy, but substantially similar, separate document, the State of Alaska prefers to join in the Preliminary Designation, and reserves the right to subsequently specify contentions not adopted if that ever becomes relevant or appropriate.

Supplement at 2. On February 7, 1992, the defendants, including Alyeska, filed in state court a Motion Suggesting Topics for February 14, 1992 Status Conference[13] which

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[12]Exhibit H to State's motion (Clerk's Docket No. 2371).

[13]Exhibit B to State's reply (Clerk's Docket No. 2472).

proposed that the State be ordered to specify which contentions listed in the Preliminary Designation it did not adopt.

On February 28, 1992, *after* Alyeska had removed these cases on February 13, 1992, the State filed its Clarification of State of Alaska's Supplement to Plaintiff's Designation of Issues.[14] In the Clarification, the State specified that it did not adopt the contentions at issue here.

The State argued that since it clarified its position on the Preliminary Designation during the thirty-day period Alyeska had after the February 3, 1992, filing of the Preliminary Designation to remove the cases, the State should not be penalized. For purposes of removal, the question of whether jurisdiction exists is determined at the time the notice of removal is filed. *Pullman v. Jenkins,* 305 U.S. 534, 537 (1939); *Brown v. Southwestern Bell Telephone Co.,* 901 F.2d 1250, 1254 (5th Cir. 1990). If there is a subsequent narrowing of issues to eliminate federal claims, federal jurisdiction is not extinguished. *Brown,* 901 F.2d at 1254.

On February 13, 1992, when the cases were removed, the State had not yet specified any contentions in the Preliminary Designation which it did not adopt. Furthermore, the State did not repudiate its claim for punitive damages against Alyeska[15] and the contentions at issue form the basis for the request for punitive damages. The State's subsequent clarification is not effective for purposes of defeating removal jurisdiction.

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[14]Exhibit J to State's motion (Clerk's Docket No. 2371).

[15]Supplement, Exhibit H to State's motion at 4 (Clerk's Docket No. 2371).

The State's second argument was that Alyeska's counterclaim against the State must be remanded due to Eleventh Amendment considerations. Alyeska agrees that the counterclaim must be remanded.[16]

Timeliness

Plaintiffs raised the argument that removal was untimely pursuant to 28 U.S.C. § 1446(b). The pertinent portion of Section 1446(b) reads as follows:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other papers *from which it may first be ascertained* that the case is one which is or has become removable....

28 U.S.C. § 1446(b) (emphasis added). Alyeska contended that plaintiffs' February 3, 1992, Preliminary Designation was the "or other paper" from which it was first ascertained that a federal issue was raised. Since the cases were removed ten days later, Alyeska argued, the removal was timely.

Plaintiffs responded that Alyeska had notice long before the Preliminary Designation that these matters were involved. Plaintiffs submitted a list of the complaints which contained

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[16]Alyeska's opposition at 51, n.22 (Clerk's Docket No. 2505).

allegations regarding double hulls.[17] The State's complaint also raised the matter of double hulls.[18]

The complaints plaintiffs directed the court's attention to do contain allegations that Exxon was negligent by operating a single hull tanker. No claim that Alyeska was negligent in regard to single hull tankers was made until the February 3, 1992, Preliminary Designation was filed.

The allegations regarding double hulls did not give rise to a right to remove when they were asserted against Exxon because those allegations were not sufficiently substantial to support removal. Plaintiffs had alleged numerous alternative theories in support of the allegations of negligence asserted against Exxon. Where a claim for relief can be established through several different theories, and only one of those several theories raises an issue of federal law, the federal law issue is generally not considered substantial enough to support removal. *Christianson v. Colt Industries,* 486 U.S. 800, 811 (1988); *Hunter v. United Van Lines,* 746 F.2d 635, 646 (9th Cir. 1984), *cert. denied,* 474 U.S. 863 (1985). In contrast, the claim against Alyeska for causing the spill, which was raised in the Preliminary Designation, does not have alternative theories. If federal law is involved in the claim against Alyeska, which was raised in the Preliminary Designation, it would be substantial enough to support removal.

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[17]Exhibit 16 to State Court Plaintiffs' motion at § 3 (Clerk's Docket No. 2363); see also Exhibit 18 at ¶ 25(c), Exhibit 13 at 33-34, and Exhibit 11 at 6.

[18]Exhibit C to State's motion at 26, ¶ 76, ¶ 77 & ¶ 92 (Clerk's Docket No. 2371).

Plaintiffs did not direct the court to any earlier references to Alyeska's failure to require double hulls, tug escorts, or radar and navigational systems, which were the subject of *Chevron v. Hammond.* At most, plaintiffs made earlier reference to Alyeska's failure to take "adequate preventative measures,"[19] which is too generalized of a statement to have alerted Alyeska that *Chevron v. Hammond* was implicated.

The court has concluded that the contentions against Alyeska regarding double hulls, tug escorts, radar and navigational systems were first raised in the February 3, 1992, Preliminary Designation. Removal, therefore, was timely.

Complete Preemption

Alyeska contended that the Supreme Court's decision in *Ray* and Judge Fitzgerald's opinion in *Chevron v. Hammond* clearly establish oil taker design as one of those areas so exclusively governed by federal law that the doctrine of "complete preemption" applies to supply a basis for removal.

The test for complete preemption is whether Congress "clearly manifested an intent" to convert a state law complaint into one stating a federal claim. *Price v. PSA, Inc.,* 829 F.2d 871, 876 (9th Cir. 1987), *cert. denied sub nom., Psgroup v. United States Dist. Court for Southern Dist. of California,* 486 U.S. 1006 (1988) (citing *Metropolitan Life Insurance Co. v. Taylor,* 481 U.s. 58, 66 (1987)). The requisite congressional intent for complete preemption has not been shown here to be "clearly manifested". In *Metropolitan*

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[19]Exhibit 13 to State court Plaintiffs' motion at 34, ¶ i (Clerk's Docket No. 2363).

life, 481 U.S. 58 (1987), Justice Brennan and Justice Marshall wrote in their concurring decision:

> [O]ur decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to preempt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* manifested an intent to make causes of action ... *removable to federal court.*" In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court.

Metropolitan Life, 481 U.S. at 67-68 (emphasis in original; citation omitted).

Alyeska's complete preemption argument is not persuasive.

Federal Res Judicata

Alyeska's federal *res judicata* argument is closely related to its complete preemption argument. Essentially the federal *res judicata* argument is that plaintiffs' state law claim is an "artfully pleaded" federal claim which has already been determined in this court in *Chevron v. Hammond.*

The artful pleading doctrine has been used in combination with the doctrine of *res judicata* to allow removal under limited circumstances.

> In both *Salveson [v. Western States Bankcard Ass'n,* 731 F.2d 1423 (9th Cir. 1984)] and *Sullivan [v. First Affiliated Secur., Inc.,* 813 F.2d 1368 (9th Cir.), *cert. denied,* 484 U.S. 850 (1987)], this court looked to *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S. Ct. 2424, 69 L.Ed.2d 103 (-1981), and concluded that where a plaintiff files state claims after a federal judgment has been entered against him *on essentially the same claims,* the district court may invoke the artful pleading doctrine as a basis for federal jurisdiction and dismiss the claims under the principles of res judicata.

Ultramar America, Ltd. v. Dwelle, 900 F.2d 1412, 1415 (9th Cir. 1990 (emphasis added).

The claim involved in *Chevron v. Hammond* was a challenge to the validity of the Alaska Tanker Law. The punitive damages claims involved here are an attempt to punish the oil industry for having been successful in *Chevron v. Hammond.* While *Chevron v. Hammond* provoked the claims involved here, the claims involved in the two cases are not "essentially the same" for purposes of the artful pleading doctrine. The validity of a state statute is not the same issue as liability for punitive damages to private parties.

Federal *res judicata* does not provide support for Alyeska's removal of these cases.

Collateral Attack

Alyeska argued that as a result of the judgment in *Chevron v. Hammond,* the oil companies were legally entitled to follow federal law rather than the requirements of the Alaska Tanker Law. Alyeska interpreted the Preliminary Designation as indicating that plaintiffs plan to ask an Alaska jury to characterize conduct which complies with federal law as reckless. Alyeska contended that plaintiffs' efforts to impose a standard on Alyeska which is inconsistent with the judgment in *Chevron v. Hammond* is a collateral attack on that judgment.[20]

Plaintiffs responded that they are not challenging the judgment in *Chevron v. Hammond* as being invalid or not effective. Rather, plaintiffs contended that they are not subject to the judgment and that they are merely presenting evidence relating to the factual contentions as part of their proof on the issues of liability and punitive damages. The language of the Preliminary Designation, particularly the heading for Section B, is at odds with plaintiffs' statement that these are merely factual contentions.

Where a collateral attack is involved, a state court action may be removed to the appropriate federal court on the basis of a general federal question. 7 *Moore's Federal Practice* ¶ 60.38[1].

> [A]n action to enjoin or otherwise obtain relief from a federal judgment involves the

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[20]A collateral attack was defined by Alyeska at oral argument as any attempt to relitigate issues or claims which were decided by a prior judgment.

> validity of the judgment as a continuing obligation; the substantive principles of the action are federal; and, we believe, presents a general federal question.

Id. (footnotes omitted).

In support of its collateral attack argument, Alyeska cited a number of analogous cases, including *Striff v. Mason,* 849 F.2d 240 (6th Cir. 1988), and *Nowling v. Aero Services International, Inc.*, 734 F. Supp. 733 (E.D. La. 1990). The court finds these cases to be very persuasive. In *Striff*—an employment discrimination case which raised claims settled by a consent decree that controlled promotions within the police department and that was entered in previous litigation to which plaintiff was not a party—the court stated:

> Where an action appears to involve issues unrelated to a consent decree, but examination of the substance of the claim reveals that a consent decree is implicated and its implementation would be adversely affected, the action is properly considered a collateral attack on the decree.

Striff, 849 F.2d at 245. The court held that plaintiff's claim that there should be no promotions to lieutenant so long as plaintiff was held to be ineligible "had a sufficient federal character to support removal" under 28 U.S.C. § 1441(b). *Striff,* 849 F.2d at 245.

In *Nowling,* shareholders brought an action in state court which sought a declaration that a state statute applied to the defendant corporation's voting shares. Two previous federal cases had held that the statute did not apply to this defendant

corporation's voting shares (referred to as the "*Trenk* Orders"). The state case was removed and a motion to remand was denied. The court stated:

> Thus, what the Nowlings [plaintiffs] really want is not the isolated ruling of a state court, but a repudiation of this Court's earlier *Trenk* Orders by a state court. ...In fact, a purported state law claim that has sufficient federal character may be removed. And a state law claim is said to have federal character when, as here, it calls into question a federal court order.

Nowling, 734 F. Supp. at 737 (citations omitted).

Alyeska argued that plaintiffs' claims are in reality claims to enforce the requirements enjoined by the judgments in *Chevron v. Hammond.* Plaintiffs responded that the injunctions are limited to enforcement of the Alaska Tanker Law and its implementing regulations and that plaintiffs are not attempting to enforce that invalidated statute and its regulations. Alyeska argued that the measures, such as double hulls, plaintiffs want the jury to impose as the necessary standard of care are the same measures required by the Alaska Tanker Law. The following additional precedents demonstrate that Alyeska has the better of the argument.

In *Palmer v. Liggett Group, Inc.,* 825 F.2d 620 (1st Cir. 1987), the court held that in a suit for damages against cigarette manufacturers and distributors, which was based on a common law theory of inadequate warnings about harmful health effects of cigarette smoking, the common law cause of action was preempted by the Federal Cigarette Labeling and

Advertising Act.[21] The court reasoned that the state common law theory would excessively disrupt the balance of purpose between health protection and trade regulation established by Congress under the Act.

> If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirements as "promulgated" by a jury's findings.
>
> ....
>
> ...Effecting such a change in the manufacturer's warning requirements is the very action preempted by § 1334 of the Act. Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

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[21]On June 24, 1992, the United States Supreme Court decided *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, which held that section 5 of the Federal Cigarette Labeling and Advertising Act of 1965 did not preempt state law damages actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements. The Court also held that the broad language of amended section 5(b) of the Public Health Cigarette Smoking Act of 1969 extends the section's preemptive reach beyond positive enactments to include some common law damages actions.

Palmer, 825 F.2d at 627-28. In *Chevron v. Hammond,* Judge Fitzgerald held that the Alaska Tanker Law was preempted by the PWSA. To allow the jury to impose damages, indeed punitive damages, against Alyeska for not having double hulls, tug escorts and specific navigational and communication equipment, which are not required by the PWSA, would undermine the objectives established by Congress under the PWSA. If successful, plaintiffs' state court claims would effectively compel the use of double hulled vessels, despite this court's holding that such a requirement is preempted.

In *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), the Supreme Court held that where picketing by unions was arguably encompassed by the National Labor Relations Act,[22] a state court had no jurisdiction to

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[22] When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted....

...If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7 or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States ....

...Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced.

award the employer damages for injuries caused by picketing on the grounds that picketing constituted a tort under state law.

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the [National Labor Relations] Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Garmon, 359 U.S. at 247, *quoted in Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4708 (U.S. June 24, 1992).[23]

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245-6 (1959).

[23]In his dissent, Justice Blackmun took issue with the majority's reliance on *Garmon*.

In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), a suit alleging unfair competition regarding a pole lamp, the Court held that because of federal patent laws, a state may not award damages for copying articles which are unpatented and uncopyrighted.

> Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent law.

Stiffel, 376 U.S. at 231.

While plaintiffs' claims do not specifically seek to enforce the Alaska Tanker Law and its regulations, the end result is the same. Plaintiffs are attempting to impose damages on Alyeska as punishment for not having met the

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> [T]he Court apparently finds *Garmon's* statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," ... sufficient authority to warrant extinguishing the common-law actions at issue in this case. ...I am not persuaded. Not only has the Court previously distinguished *Garmon*, but it has declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption.

Cipollone, 60 U.S.L.W. at 4712 (footnote omitted). *Garmon* was previously distinguished as being a case which involved a special "presumption of federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. *Cipollone*, 60 U.S.L.W. at 4712, n.3. *See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984).

same standards that the Alaska Tanker Law required. In addition, the plaintiffs apparently seek to punish Alyeska for challenging the Alaska Tanker Law in court even though Alyeska was not a party to *Chevron v. Hammond.* Plaintiffs' state court claims must be considered to come within the scope of the *Chevron v. Hammond* injunctions because they are an indirect attempt to enforce the requirements of the Alaska Tanker Law.

The court concludes that the claims of all the moving plaintiffs and the State were properly removed by Alyeska. The claims are a collateral attack on *Chevron v. Hammond.*

Consent Decree

Plaintiffs' final argument in support of their motion to remand is that their claim for natural resource damages, as presented in the Preliminary Designation, is only for private damages and, therefore, is not barred by the Agreement and Consent Decree entered in *United States v. Exxon Corporation,* Case No. A91-082 Civil, and *State of Alaska v. Exxon Corporation,* Case No. A91-083 Civil. Plaintiffs argued that the consent decree is not *res judicata* because the state court plaintiffs were not parties to the consent decree. Plaintiffs further argued that even if the consent decree were *res judicata* as to the claims of the state court plaintiffs, it would not render the state court cases removable.

Assuming, without deciding, that the consent decree is *res judicata* as to the plaintiffs' claims for natural resource damages, that merely raises a defense. A defense, even a federal defense, does not support removal.

Conclusion

The State Court Plaintiffs' motion to remand Case Nos. A92-077 through A92-226 (except Case Nos. A92-174, A92-175, and A92-215), and Case No. A92-278 is denied. The Preliminary Designation constitutes a collateral attack on *Chevron v. Hammond.* For the same reason, the State's motion to remand Case No. A92-175 is denied. Alyeska's counterclaim against the State, which is included with Case No. A92-175, is severed and remanded.

Plaintiffs have fifteen (15) days from the date of this order to oppose defendants' Motion to Vacate Pretrial Order No. 34 and Trial-Setting Order.[24] Plaintiffs were previously prevented from opposing the motion by this court's stay on motion practice. In Order No. 79,[25] this court deferred ruling on the motion until after the motions to remand were decided. Any further filings related to the Preliminary Designation of Issues for April 1993 Trial are stayed.

DATED at Anchorage, Alaska, this 31 day of July, 1992.

/s/ H. Russel Holland
United States District Judge

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[24]Clerk's Docket No. 2401.

[25]Clerk's Docket No. 2483.

APPENDIX A

APPENDIX A(ii)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 91

MOTION FOR REMAND IN CASE NO. A92-353 CIVIL

(P-5464 TO P-5576)

On December 24, 1991, *Adams v. Exxon Corp.*, Case No. 3CO-91-96 was filed in Superior Court. Defendants removed (Clerk's Docket No. 2081) the action to federal court on January 14, 1992, Case No. A92-029 Civil. One day after removal, the plaintiffs voluntarily dismissed the action (Clerk's Docket No. 2084). Then, on March 18, 1992, *Adams v. Exxon Corp.* was refiled in Superior Court with

some additional plaintiffs[1] (Collectively "Adams" plaintiffs) (P-5464 through P-5576). Defendants removed this action on April 16, 1992, Case No. A92-353 Civil. The *Adams* plaintiffs move for remand.[2] Oral argument has been requested, but is deemed unnecessary.

This court held in Order No. 83 (Clerk's Docket No. 2710), filed July 31, 1992, that the February Preliminary Designation of Issues ("Designation") filed by the state court plaintiffs on February 3, 1992, constituted a collateral attack on a federal judgment, specifically the judgment in *Chevron v. Hammond,* Case No. A77-195 Civil, and thus found the extensive removals to be proper because of the existence of a federal issue.

The *Adams* plaintiffs recognize this court's Order No. 83. Notwithstanding their disagreement with the order, it is the law of the case. Therefore, if the Designation is deemed to apply to the *Adams* plaintiffs, removal was proper because of the existence of a federal question in the collateral attack on a federal judgment.

The dispute centers around two pretrial orders entered in Superior Court. Pretrial Order No. 1, dated June 8, 1989, filed in state court states:

> Any other related actions hereafter filed in this Court shall be consolidated with these cases for pretrial purposes. Each party

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[1]The refiled Superior Court case was assigned Case No. 3AN-92-2359 Civil.

[2]Clerk's Docket No. 2545.

> whose case is consolidated will be governed by the terms of this and any subsequent pretrial order entered by the Court, unless a party has made a specific objection to any pretrial order or to the objectionable portion of any pretrial order, and the Court, after hearing, has sustained such objection.

Pretrial Order No. 1, at 2.

Pretrial Order No. 37, dated January 27, 1992, states: "All parties asserting any claim or counterclaim shall . . . file a statement of issues they intend to try at the trial." Pretrial Order No. 37, at 1. On February 3, 1992, the Designation was filed, which formed the basis of the notices of removal, and subsequently formed the basis of this court's determination that the removals were proper.

The issue is whether Pretrial Order No. 1, and Pretrial Order No. 37, which ordered the filing of the Designation, render the Designation binding upon litigants not parties to the oil spill case when the Designation was filed on February 3, 1992, notwithstanding the extensive removals that occurred on February 13, 1992.

The *Adams* plaintiffs were governed by Pretrial Order No. 1. As a result, the action was consolidated and subject to all pretrial orders of the Superior Court including Pretrial Order No. 37, which required the statement of issues. When defendants removed *Adams* on April 16, 1992, *Adams* had been on file for almost one month. The *Adams* plaintiffs had sufficient time to object to the Designation, which was required by Pretrial Order No. 37, or be bound by it as stated

in Pretrial Order No. 1. The Designation applied to the *Adams* plaintiffs and as such, removal was proper.

Lastly, defendants removed this action in a timely manner because defendants removed this action within thirty days of first ascertaining that the *Adams* plaintiffs' action was removable, 28 U.S.C. § 1446(b), which was the date the Designation was binding upon these plaintiffs, the date this action was refiled in state court, March 18, 1992.

CONCLUSION

The *Adams* plaintiffs' motion for remand is DENIED.

Dated at anchorage, Alaska this 15 day of September, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX A

APPENDIX A(iii)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 92

Case No. A92-461

D.M. ADAMS' (P5584 THROUGH P-5618)

MOTION FOR REMAND

On June 3, 1992, *Adams v. Exxon Corp.*, Superior Court No. 3KN-92-526, was filed in state court. Exxon Corp. (D-1), Exxon Shipping, Inc. (D-2), and Alyeska Pipeline Service Co. (D-3) removed the action to this court on June 26, 1992, Case No. A92-461 Civil. The plaintiffs in Case No. A92-461 Civil (P-5584 through P-5618) (collectively referred to as "Adams plaintiffs") moved for remand (Clerk's Docket No. 2751) on August 18, 1992. The court

assumes, but does not decide, that the Adams plaintiffs' motion for remand was timely.

This court held in Order No. 83 (Clerk's Docket No. 2710), filed July 31, 1992, that the February Preliminary Designation of Issues ("Designation") filed by the state court plaintiffs on February 3, 1992, constituted a collateral attack on a federal judgment, specifically the judgment in *Chevron v. Hammond,* Case No. A77-195 Civil, and thus found the extensive removals to be proper because of the existence of a federal issue.

The Adams plaintiffs recognize this court's Order No. 83. Notwithstanding their disagreement with the order, it is the law of the case. Therefore, if the Designation is deemed to apply to the Adams plaintiffs, removal was proper because of the existence of a federal question in the collateral attack on a federal judgment.

The dispute centers around two pretrial orders entered in Superior Court. Pretrial Order No. 1, dated June 8, 1989, filed in state court states:

> Any other related actions hereafter filed in this Court shall be consolidated with these cases for pretrial purposes. Each party whose case is consolidated will be governed by the terms of this and any subsequent pretrial order entered by the Court, unless a party has made a specific objection to any pretrial order or to the objectionable portion of any pretrial order, and the Court, after hearing, has sustained such objection.

Pretrial Order No. 1, at 2.

Pretrial Order No. 37, dated January 27, 1992, states: "All parties asserting any claim or counterclaim shall . . . file a statement of issues they intend to try at the trial." Pretrial Order No. 37, at 1. On February 3, 1992, the Designation was filed, which formed the basis of the notices of removal, and subsequently formed the basis of this court's determination that the removals were proper.

The issue is whether Pretrial Order No. 1, and Pretrial Order No. 37, which ordered the filing of the Designation, render the Designation binding upon litigants not parties to the oil spill case when the Designation was filed on February 3, 1992, notwithstanding the extensive removals that occurred on February 13, 1992.

The court concludes that the Adams plaintiffs were governed by Pretrial Order No. 1. As a result, the action was consolidated and subject to all pretrial orders of the Superior court including Pretrial Order No. 37, which required the statement of issues. When defendants removed *Adams* on June 26, 1992, *Adams* had been on file for over three weeks. The Adams plaintiffs had sufficient time to object to the Designation, which was required by Pretrial Order No. 37, or be bound by it as stated in Pretrial Order No. 1. The Designation applied to the Adams plaintiffs and as such, removal was proper.

The Adams plaintiffs' motion for remand (Clerk's Docket No. 2751 is DENIED.

Dated at Anchorage, Alaska this 17 day of September, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX A

APPENDIX A(iv)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 108

MOTION FOR REMAND IN CASE NO. A92-584 CIVIL

P-2989, P-2997, P-3004, P-4169

AND P-5619 THROUGH P-5643

MOTION FOR REMAND

Talmadee Adams v. Exxon Corp., Superior Court No. 3KN-92-787 Civil, was filed in state court on August 11, 1992. Exxon Corporation (D-1), Exxon Shipping (D-2), and Alyeska Pipeline Service Company (D-3), collectively "defendants", removed the action to this court on September 8, 1992, where the action became Case No. A92-584

Civil. Plaintiffs move for remand.[1] Defendants oppose the motion.[2] No reply was filed and the time for reply has run.

This court held in Order No. 83,[3] filed July 31, 1992, that the February Preliminary Designation of Issues ("Designation") filed by the state court plaintiffs on February 3, 1992, constituted a collateral attack on a federal judgment, specifically the judgment in *Chevron v. Hammond,* Case No. A77-195 Civil, and thus found the extensive removals to be proper because of the existence of a federal issue.

The plaintiffs in Case No. A92-584 recognize this court's Order No. 83. Notwithstanding their disagreement with the order, it is the law of the case. Therefore, if the Designation is deemed to apply to the plaintiffs, removal was proper because of the existence of a federal question in the collateral attack on a federal judgment.

The dispute centers around two pre-trial orders entered in Superior Court. Pretrial Order No. 1, dated June 8, 1989, filed in state court states:

> Any other related actions hereafter filed in this Court shall be consolidated with these cases for pretrial purposes. Each party whose case is consolidated will be governed by the terms of this and any subsequent pretrial order entered by the Court, *unless a party has made a specific objection to any*

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[1]Clerk's Docket No. 2914.

[2]Clerk's Docket No. 2964.

[3]Clerk's Docket No. 2710.

> *pretrial order or to the objectionable portion of any pretrial order,* and the Court, after hearing, has sustained such objection.

Pretrial Order No. 1, at 2 (emphasis added).

Pretrial Order No. 37, dated January 27, 1992, states: "All parties asserting any claim or counterclaim shall . . . file a statement of issues they intend to try at the trial." Pretrial Order No. 37, at 1. On February 3, 1992, the Designation was filed, which formed the basis of the notices of removal, and subsequently formed the basis of this court's determination that the removals were proper.

The issue is whether Pretrial Order No. 1, and Pretrial Order No. 37, which ordered the filing of the Designation, render the Designation binding upon litigants not parties to the oil spill case when the Designation was filed on February 3, 1992, notwithstanding the extensive removals that occurred on February 13, 1992.

The plaintiffs were governed by Pretrial Order No. 1. As a result, the action was consolidated and subject to all pre-trial orders of the Superior Court including Pretrial Order No. 37, which required the statement of issues. When defendants removed this action on September 8, 1992, this case has been on file for almost one month. The plaintiffs had sufficient time to object to the Designation, which was required by Pretrial Order No. 37, or be bound by it as stated in Pretrial Order No. 1. The Designation applied to the plaintiffs and as such, removal was proper.

The motion for remand (Clerk's Docket No. 2914) is DENIED.

Dated at anchorage, Alaska, this 16th day of November, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX B
TEXT OF STATUTES INVOLVED

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

28 U.S.C. § 1441.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such

action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * *

28 U.S.C. § 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on

the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * *

28 U.S.C. § 1447

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

* * *

APPENDIX C

Rule 29.1 Statement

165550 Canada Limited
172965 Canada Limited
2849518 Canada Limited
571270 Alberta Limited
590320 Alberta Ltd.
AGA Progas a.s
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Acquifund Resources Limited
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B. V.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company
AquaAir Environmental, Inc.
Aramco Services Company
Asakawa Sekiyu K.K.
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
B.W.O.C., Inc.

BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.
Beaverhill Resources Limited
Brickwood Holdings Pty. Ltd.
Bryan Austin Chalk Operating Committee, Inc.
Bryan Woodbine Gathering, Inc.
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
CeraMem Separations, Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Comcor Chemicals Limited
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Copim St. Lawrence Ltd.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots Petroliers de la Corse
Depots de Petrole Cotiers
Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited

Disma S.r.l.
Dixie Pipeline Company
Dunbar Oil Ltd.
E S F Limited
ETD Tankdienst Gesellschaft Duesseldorf GbR
Eagle Kenso K.K.
Eagle Reinsurance Co. Ltd.
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Emulsions de Feyzin
Emulsions du Dauphine
Energie Marketing Service GmbH
Enterprise Housing Partners 1992 Limited Partnership
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Erdoel-Raffinerie Deurag-Nerag GmbH
Esso (Overseas) Pension Trust Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso Lub'Services
Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso S.A.F.
Esso Standard Thailand Ltd.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Esso Yukong Specialities Ltd.
Etablissements Cloarec

Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Mobile Bay Partnership
Exxon de Colombia S.A.
F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Geschaeftsstadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft
Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
Gasunie Engineering B.V.
Gasunie Warmte/Kracht Emmen B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane - Lavera
Ges. fur Mineraloelveredlung und Distribution Rhaesa mbH
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier

Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de Saint-Pierre des Corps (G.P.S.P.C.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Marne (G.P.V.M.)
Groupement d'Exploitation du Depot de Reception de Chennevie
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitungs-G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario General Partnership)
Imperial Oil Limited
Imperial Oil Resources Limited
Imperial Oil Resources N.W.T. Limited
Imperial Oil Resources Ventures Limited
Imperial Oil Resources an Alberta Limited Partnership
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Iranian Oil Participants Limited (Iranian Consortium)
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited

Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Jaymo SNC
Jersey Nuclear-Avco Isotopes, Inc.
K. K. Momose Shiojiri Stand
K. K. Toresen
K.K. Aizu General
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech
K.K. Genex
K.K. Heian Sekiyu
K.K. Kyoei Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
KX Industries, L.P.
Kabushiki Kaisha Sankyo Plastics
Kabushiki Kaisha Serubisu
Kai Tak Refuellers Company Limited
Kansai Chuo Sekiyu K.K.
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kemcor Australia Pty. Ltd.
Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.

Kemcor Plastics Pty. Ltd.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Korea Perchem Company Limited
Kosxon Chemical Company Limited
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K. K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kygnus Trading Kabushiki Kaisha
Kyushu Eagle K.K.
L-Net East K.K.
L-Net West K.K.
L12A (Groep) B.V.
L12B/L15B (Groep) B.V.
L14 (Groep) B.V.
L15A (Groep) B.V.
L2 (Groep) B.V.
L5a (Groep) B.V.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Liants Routiers de la Vallee de la Loire (LRVL)
Liants Routiers du Gard (L.R.G.)
Lilac Sekiyu Kabushiki Kaisha
Lily Sekiyu K.K.
Lithcon Petroleum International (Bahamas) Inc.
Lithcon Petroleum Taiwan Inc.
Long Beach Oil Development Company
MEGAL FINCO

MEGAL GmbH
Maasvlakte Olie Terminal C.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Bhd
Manchester Airport Storage and Hydrant Company Limited
McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
Meiji Sekiyu K.K.
Mikawa Bussan K.K.
Mitake Unso K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrank
Mode Wheel Property Limited
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Multi Tank Card B.V.
Mytex Polymers (General Partnership)
N. V. Nederlandse Gasunie
NAM - K 14 B.V.
NAM - K 15 B.V.
NAM - K 7 B.V.
NAM-K17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation

Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
New Cure, Inc.
Newcastle Coal Shippers Pty. Limited
Nichiei Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankte
Noroxo
Northward Developments Ltd.
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oldenburgische Erdoel Gesellschaft G.m.b.H.
Oleoducto de Colombia S.A.
Oleoductos Canarios, S.A.
Osaka General Gas K.K.
Osaka Kygnus K.K.
P. T. Stanvac Indonesia
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
PIMEC Inc.
Pacesetter Enterprises Limited
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pier Atlantic Limited
Pipe Line Services, Inc.

Plantation Pipe Line Company
Port-Jerome Gaz (P.J. Gaz)
Portland Pipe Line Corporation
Primaeroel GmbH
Prince William Sound Oil Spill Response Corporation
Progas Limited
Projectbureau W/K B.V.
Quadrant Gas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft G.m.b.H.
Rotterdam Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam Antwerpen Pijpleiding C.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Rubiatec Sendirian Berhad
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Geneve
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
SERAM S.p.A.
SOVEXOIL Oil Field
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Senboku Oil Kikoh K.K.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K.K.
Smiley Gas Conservation Limited
Sociedad Nacional de Oleoductos Ltda.

Sociedad de Inversiones Limited
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Geomines-Caen
Societe Anonyme Produits Lubrifiants de Madagascar - PROLU
Societe Anonyme de Gestion de Stocks de Securite (SAGE-SS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dech
Societe Esso de Recherches et d'Exploitation Petrolieres
Societe Francaise EXXON CHEMICAL
Societe Havraise de Manutention de Produits Petroliers
Societe Malgache de Raffinage
Societe Paris-Manche
Societe Paris-Niel
Societe Reunionnaise d'Entreposage
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Societe d'Exploitation & de Developpement d'Operations Comme
Societe d'Exploitation des Garages Les Stations Tour Eiffel
Societe de Manutention de Carburants Aviation (S. M. C. A.)
Societe de Promotion et de Financement Touristique (CART-HAGO)
Societe de la Raffinerie d'Alger
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Socony-Standard-Vacuum Oil Company (Petroleum Maat-schappij)

Southern Natural Gas Development Pty. Ltd.
Standard Kaihatsu K.K.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Stansted Fuelling Company Limited
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschrankter
Sun East (Dublin) Company, Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.
Synergistics Industries (NJ) Inc.
Synergistics Industries (TX) Inc.
Synergistics Industries Limited
TAR-Tankanlage Ruemlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TCA Plastics Inc.
TEAM Terminal B.V.
TFS Turbo Fuel Services GmbH, Hamburg
TGF Tankdienst Gesellschaft Frankfurt G.b.R.
TGM Tankdienst-Gesellschaft Muenchen GbR
TIBA Speditions GmbH
TLS Tanklager Stuttgart GmbH
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Taegerschen AG
Tanklager-Gesellschaft Tegel G.b.R.
Tanklagergesellschaft, Koeln-Bonn G.b.R.
Tecnica Quimica Petrolera, S.A. de C.V.
Terminal Petrolier de Bordeaux (T.P.B.)
Thai Aliphatics Company Limited
Thai C-Center Company Limited

Thai Petroleum Pipeline Co., Ltd.
Thyssengas G.m.b.H.
Tohpren Co., Ltd. (Chemical)
7Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Chemical Nasu Co., Ltd.
Tonen Energy International Corp.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Filare Co. Ltd.
Tonen Film Company Limited
Tonen Kabushiki Kaisha
Tonen Kagaku K.K.
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K. K.
Tonex Company Limited
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Northern Pipelines Inc.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Verbundnetz Gas AG
Wako Jushi Kabushiki Kaisha
Warmtepomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.

Westgas G.m.b.H.
Woodbine Marketing Co., Inc.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)

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No. 94-855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EXXON CORPORATION, *et al.*,
Petitioners,
v.
EYAK NATIVE VILLAGE, *et al.*,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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December 12, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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JOINT MEMORANDUM IN OPPOSITION

The Conditional Cross-Petition filed by Exxon Corporation and Exxon Shipping Company (collectively "Exxon") asks this Court to consider three additional questions if it grants our Petition in No. 94-650. Two of those questions (Nos. 1 and 3) are *identical* to the questions presented in a previous Petition by Exxon, No. 94-385, which this Court denied on October 11, 1994, and declined to rehear on November 28, 1994. The other question (No. 2) is one that Exxon told the Court below was omitted from its Petition in No. 94-385 because Exxon had "concluded that the argument that the fact-specific ruling by [the Court of Appeals] as to Order 83 should provide an independent basis for the Supreme Court to hear the matter simply 'would not write'" and was "certain to be re-

jected." [1] In short, this Court has already found two of the questions presented by this Cross-Petition not certworthy, and Exxon itself has admitted that the third is not.

Exxon's Cross-Petition therefore rests solely upon the proposition that if certiorari is granted on the questions raised by our Petition in No. 94-650, "substantive and pragmatic considerations make it equally important for this Court . . . to address all of the removal issues" decided below, without regard to Rule 10's criteria (Cross-Pet. 10, 19-20). Exxon does not deny that the questions presented by our Petition (regarding the legal standards for federal question removal and for "entire case" removal under 28 U.S.C. § 1441(c)) are entirely distinct from those presented by this Cross-Petition (regarding application of the time limits of 28 U.S.C. § 1446(b) to the particular circumstances under which certain removal notices were filed). Nor does it deny that the *EXXON VALDEZ* cases involved in our Petition (principally class actions) are separate from those involved in the Cross-Petition (principally "direct actions" by class-action opt-outs and other individual plaintiffs).

Contrary to the basic premise of Exxon's Cross-Petition, this Court does not grant certiorari based on "pragmatic considerations" regarding the management of a particular litigation in the lower courts. The Cross-Petition, like the earlier Exxon Petition denied in No. 94-385, does not meet any of the Rule 10 criteria because it presents, at

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[1] Response of Appellees to Court Order of October 6, 1994, filed in *Eyak Native Village v. Exxon Corp.*, 9th Cir. No. 93-35274, on Oct. 13, 1994, p. 2 n.2. Exxon made this statement in explaining its failure to fulfill completely the terms of a stay which it had obtained from the Court of Appeals under Fed. R. App. P. 41(b) by representing that it would seek certiorari as to all four of the District Court orders reversed by the Court of Appeals' decision below. Exxon's Petition in No. 94-385 sought certiorari as to District Court Orders Nos. 91, 92 and 108 but not as to Order No. 83 (which is the subject of Question No. 2 in the present Cross-Petition).

most, extremely narrow questions as to the application of explicit statutory requirements to unique and complex circumstances that are unlikely to recur.[2] *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

For the foregoing reasons, Exxon's conditional cross-petition for a writ of certiorari should be denied. There is no basis for Exxon's suggestion (Cross-Pet. 21) that it be held pending disposition of No. 94-650, where both the parties and the issues are entirely different; doing so would have the unwarranted and unjust effect of delaying still further the resumption of state court proceedings that the Court of Appeals held were improperly interrupted almost three years ago.

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[2] It is apparent from Exxon's own presentation that the questions posited in the Cross-Petition, all regarding application of the 30-day time limit for removal, focus entirely on the minutiae of this particular litigation. See particularly Cross-Pet. 4-6. As we further showed in our Joint Brief in Opposition in No. 94-385, the points which questions 1 and 3 of the Cross-Petition purport to raise were expressly waived by Exxon's categorical statement in its Court of Appeals brief (at 2) that "the outcome as to Order 83 will govern the outcome as to Orders 91, 92 and 108." Notwithstanding the Cross-Petition's largely verbatim repetition of Exxon's denied Petition in No. 94-385, we shall not burden the Court with a repetition of the additional reasons for denying certiorari given in our Joint Brief in Opposition there. Nor do we repeat here the pertinent points made by the Reply Brief for Petitioners in No. 94-650, which is also being filed today.

Additionally, we doubt that Exxon's purported Cross-Petition qualifies as such under Rule 12.3 in view of the separateness of the orders under review, the cases, and the plaintiffs involved from those involved in our Petition. Unless treated as a proper cross-petition, Exxon's filing is untimely because it came more than 90 days after the Court of Appeals' July 13, 1994 denial of rehearing.

Respectfully submitted,

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